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FIRST GENERAL COUNSEL'S REPORT

Pre-MUR: 481
DATE MATTER REFERRED: 12/16/08
DATE ACTIVATED: 3/9/09
DATES PRE-RTB RESPONSES
RECEIVED: 8/4/09 & 8/12/09
EXPIRATION OF SOL: 3/5/10-3/31/11

RESPONDENTS:

Glenn Marshall

RELEVANT STATUTES:

2 U.S.C. § 441b
2 U.S.C. § 441f
11 C.F.R. § 110.4

INTERNAL REPORTS CHECKED:

Disclosure Reports

I. INTRODUCTION

This matter

contains a five-count criminal felony

Information ("Information") filed against Glenn Marshall ("Marshall"), former chairman of the Mashpee Wampanoag Indian Tribe Council, Inc. ("Tribal Council" or "Tribe").

The Information alleges, among other things, Marshall's violation of federal campaign election law by knowingly and willfully consenting to illegal corporate contributions by means of making and encouraging others to make illegal conduit contributions totaling approximately \$50,000 to various federal officials in order to curry favor for federal

1 recognition of the Tribe. *See* Attachment 1 at ¶¶ 8-12. Marshall reimbursed the straw
2 contributors, including himself, from an account belonging to the Mashpee Fisherman's
3 Association, Inc. ("Fisherman's Association").¹ *Id.*

4 On December 11, 2008, Marshall signed a plea agreement ("Plea Agreement")
5 with DOJ admitting guilt on all five felony counts. *See* Attachment 2. Under the Plea
6 Agreement, Marshall agreed to cooperate with authorities in their investigation in
7 exchange for a sentence recommendation on the low end (3 ½ years) of the advisory
8 sentencing guideline range and restitution of over \$467,000. *Id.* On February 11, 2009,
9 Marshall entered a guilty plea on all counts with the U.S. District Court for the District
10 for Massachusetts. On May 7, 2009, he was sentenced to serve 3 ½ years in prison, to
11 make restitution in the amount of \$383,000 for the embezzled tribal funds, and to repay
12 approximately \$80,000 to the Social Security Administration. Marshall is currently in
13 prison in Pennsylvania.

14 For reasons set forth below, we recommend that the Commission decline to open
15 a Matter Under Review in this matter and close the file.

16 **II. FACTUAL OVERVIEW**

17 The Tribe is a Native American tribe that has over 1,000 members, most of whom
18 live in or near the Town of Mashpee, Massachusetts. Attachment 1 at ¶ 2. The Tribal
19 Council was incorporated in 1974 as a not-for-profit corporation organized under
20 Massachusetts law, and it serves as the governing body of the Tribe. *Id.* at ¶ 3. On or
21 about February 15, 2007, the Secretary of the Interior recognized the Tribe as an Indian

¹ While the Information refers to one account held by the Fisherman's Association, the Tribe indicates, in its pre-reason to believe response, that there might be multiple accounts held by the Fisherman's Association. Attachment 1 at ¶ 38 and Attachment 3 at 2. For purposes of the Report, we will refer to the Fisherman's Association account in the singular.

1 tribe under federal law. *Id.* Since the Tribal Council is the corporation that operates on
2 behalf of the Tribal membership, the recognition agreement is between the U.S.
3 Government and Tribal Council. Attachment 3. Therefore, it appears that the Tribal
4 Council and the Tribe are one and the same for all purposes relevant here.

5 Marshall, as a tribal member, served as chairman of the Tribal Council from
6 February 2001 to August 2007. Attachment 1 at ¶ 1. In addition, between 2003 and
7 2008, Shawn Hendricks, Sr. ("Hendricks") served as Vice-Chairman, and Desire Moreno
8 ("Moreno") served as Clerk.

9 The Fisherman's Association is a non-profit Massachusetts corporation that was
10 originally established in 1998 to promote the Tribe's ancestral shell fishing interests on
11 the southern shore of Cape Cod. *Id.* at ¶ 9. Prior to 2003, the Fisherman's Association
12 was dormant. *Id.* Only Marshall and one other Tribal Council officer had signatory
13 authority on the Fisherman's Association account. *Id.* at ¶ 37.

14 Beginning in 1999, the Tribe's effort for federal recognition was underwritten by
15 a Michigan-based limited liability corporation, AtMashpee, which provided the Tribe
16 with millions of dollars for its operations and for legal, lobbying, and other professional
17 services, in exchange for an equity stake in any casino the Tribe might ultimately build.
18 Attachment 1 at ¶ 6. The Tribal Council hired unidentified "Political Consultant A" in or
19 about late 2001 to coordinate its lobbying activities in support of the Tribe's federal
20 recognition effort and authorization to build and operate a casino. *Id.* at ¶ 32.

21 In mid-2002, Marshall concluded that the lobbyists recommended by AtMashpee
22 had failed to build sufficient political pressure in Congress for the Tribe's petition.
23 Attachment 1 at ¶ 33. Accordingly, in September 2002, Marshall decided to replace the

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1 lobbyists and directed Political Consultant A to find a Washington, D.C. lobbyist who
2 would be more effective in presenting the Tribe's case for recognition. *Id.* In early 2003,
3 Jack Abramoff ("Abramoff") began working for the Tribe. *Id.* at ¶ 35.

4 Abramoff advised Marshall, Political Consultant A, and another unidentified
5 officer of the Tribal Council that, in order to advance its recognition effort, the Tribe
6 needed to make significant political contributions to certain Members of Congress so that
7 they might build political pressure on the Department of Interior to grant the Tribe's
8 petition. Attachment 1 at ¶ 36. Around the same time, Political Consultant A and certain
9 other professionals hired by the Tribal Council informed Marshall that they preferred to
10 be paid directly by the Tribal Council rather than by AtMashpee. *Id.* at ¶ 37.

11 Sometime during 2003, Marshall arranged it so that AtMashpee would fund the Tribal
12 Council for the payment of such services, and such funds would be directly transferred
13 into the Fisherman's Association account. *Id.* at ¶ 37.

14 In consultation with Abramoff, his team, and lobbyists, Political Consultant A
15 recommended on numerous occasions to Marshall that certain state and federal legislators
16 receive campaign contributions. *Id.* at ¶ 40. Between 2003 and 2007, Marshall used a
17 portion of the approximately \$4 million deposited into the Fisherman's Association
18 Account by AtMashpee to make campaign contributions to various elected officials in
19 order to curry favor for the Tribe's recognition and its effort to build a casino on tribal
20 lands. *Id.* at ¶ 38, 40. Marshall has admitted to being aware that federal law prohibited
21 corporations, including the Tribal Council, from making contributions to federal
22 campaigns. Attachment 1 at ¶ 42; Attachment 2 at ¶ 1.

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1 In order to disguise the source of the contributions, Marshall solicited various
2 individuals, including family members and officers of the Tribal Council, to act as straw
3 contributors. Attachment 1 at ¶ 43. Marshall asked the family members and Tribal
4 Council officers to write a check to the candidate's re-election committee, insisting that
5 the contribution was necessary to further the Tribe's recognition effort and promising the
6 straw contributor that the Tribal Council would reimburse him or her for the contribution.
7 Attachment 1 at ¶ 43. Marshall himself also made straw contributions. *Id.*

8 The Information does not identify the recipient Federal candidates and
9 committees, and there were no allegations that any of the candidates or committees had
10 any knowledge that the contributions were unlawful, nor were any of them implicated in
11 Marshall's conduit scheme.² Attachment 1 at ¶ 46. Marshall was convicted for causing
12 the Tribal Council, through cash and check payments from the Fisherman's Association
13 Account, to reimburse straw contributors, between 2003 and 2006, approximately
14 \$50,000 in federal campaign contributions. Attachment 2. While the Information does
15 not name corporate officers Hendricks or Moreno as defendants, it does appear to
16 indirectly include some of the straw contributions made by these individuals, as
17 explained below. Based on a search of the Commission's disclosure database, we have
18 been able to identify additional potential straw contributions and the identity of those
19 conduits and recipients. We have compared the straw contributions contained in the

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Information with the contributions made by Marshall, Hendricks, and Moreno, as reflected in the Commission's disclosure database, in order to identify the additional straw contributions not accounted for in the Information.

Chart #1 is a duplicate of the chart contained in the Information, which reflects the straw contributions Marshall "caused to be made" and reimbursed with Tribal Council funds:

CHART #1

<u>Date</u>	<u>Recipient</u>	<u>Contribution Amount</u>
March 7, 2005	Political Action Committee A	\$8,000
April 19, 2005	Campaign Committee of Member of Congress A	\$4,000
April 21, 2005	Campaign Committee of Member of Congress B	\$12,000
September 28, 2005	Campaign Committee of Member of Congress A	\$800
October 14, 2005	Campaign Committee of Member of Congress A	\$900
October 17, 2005	Campaign Committee of Member of Congress C	\$6,000
	Total Amount	\$31,700

See Attachment 1 at ¶ 45.

The second chart represents the contributions made by Marshall as reflected in the Commission's disclosure database:

CHART #2

<u>Date of Contribution</u>	<u>Recipient</u>	<u>Contribution Amount</u>
3/7/05	Rich Political Action Committee	\$3,000
4/19/05	Kennedy for Senate 2012	\$2,000
4/21/05	Richard Pombo for Congress	\$2,000
4/21/05	Richard Pombo for Congress	\$2,000

³ Although the actual recipient political committees were not identified in the Information, a search of the Commission's disclosure database revealed the identity of those committees that received the contributions at issue.

<u>Date of Contribution</u>	<u>Recipient</u>	<u>Contribution Amount</u>
10/14/05	Kennedy for Senate 2012	\$900
10/17/05	Delahunt for Congress	\$2,000
3/20/06	Kendrick Meek Campaign for Congress	\$1,000
3/31/06	Stephen Lynch for Congress Committee	\$1,000
	Total Amount	\$13,900

The third chart represents the contributions, as reflected in the Commission's disclosure database, made by Hendricks and Moreno, most of which coincide by date and amount with the contributions made by Marshall in chart #2:

CHART #3

<u>Date</u>	<u>Contributor</u>	<u>Recipient</u>	<u>Contribution Amount</u>
3/7/05	Shawn Hendricks Sr.	Rich PAC	\$2,500
3/7/05	Desire Moreno	Rich PAC	\$2,500
4/19/05	Shawn Hendricks Sr.	Kennedy for Senate 2012	\$1,000
4/19/05	Desire Moreno	Kennedy for Senate 2012	\$1,000
4/21/05	Desire Moreno	Richard Pombo for Congress	\$2,000
4/21/05	Desire Moreno	Richard Pombo for Congress	\$2,000
4/21/05	Shawn Hendricks Sr.	Richard Pombo for Congress	\$2,000
4/21/05	Shawn Hendricks Sr.	Richard Pombo for Congress	\$2,000
9/28/05	Shawn Hendricks Sr.	Kennedy for Senate 2012	\$400
9/28/05	Desire Moreno	Kennedy for Senate 2012	\$400
3/14/06	Shawn Hendricks Sr.	Kendrick Meek Campaign for Congress	\$1,000
3/31/06	Desire Moreno	Stephen Lynch for Congress Committee	\$1,000
3/31/06	Shawn Hendricks Sr.	Stephen Lynch for Congress Committee	\$1,000
		TOTAL AMOUNT	\$18,800

1 A comparison of the three charts indicates that, for the period between March 7,
2 2005, and October 17, 2005, chart #1 contains all of the contributions made by Marshall,
3 Hendricks, and Moreno shown in charts #2 & #3.⁴

4 On June 26, 2009, we sent pre-reason to believe notification letters to Marshall,
5 Hendricks, and Moreno, individually and in their capacities as Tribal Council officers;
6 the Tribal Council; and the Fisherman's Association. We granted extensions to the Tribal
7 Council and Glenn Marshall, and we received responses subsequently. In addition, we
8 granted a 10-day extension to Shawn Hendricks, Sr., but did not receive a further
9 response.⁵ We received no response from Desire Moreno or the Fisherman's
10 Association.

11 Counsel for the Tribal Council, who refers to his client interchangeably as the
12 Tribe and Tribal Council, submitted a lengthy response that raises three basic arguments
13 in favor of not pursuing the Tribe in an enforcement matter. Attachment 3. First, the
14 Tribe argues that it has sovereign immunity. The Tribe conceded that a tribe can
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⁴ For example, chart #1 indicates an \$8,000 straw contribution to Political Action Committee A on March 7, 2005. Charts #2 and #3 indicate that Marshall, Hendricks, and Moreno made contributions to Rich PAC on March 7, 2005, in the amounts of \$3,000, \$2,500 and \$2,500, respectively (\$3,000 + \$2,500 + \$2,500 = \$8,000). However, chart #1 does not reflect the straw contributions as being made individually by Hendricks and Moreno. Instead, it lists contributions as being "caused to be made and reimbursed by Marshall" in one amount (\$8,000) rather than the individual contributions. In addition, there are three contributions on charts #2 & #3 that were not included in chart #1. Hendricks and Moreno also made three contributions, totaling \$3,000, on March 14th and 31st, 2006. At this time, we are unable to confirm whether these contributions were reimbursed by Marshall. Furthermore, although Marshall pled guilty to causing to be made and reimbursing approximately \$50,000 in contributions to federal candidates and committees, chart #1 only includes \$31,700 of the approximately \$50,000 in contributions.

⁵ Hendricks, in his request for an extension, stated that he could not afford to retain the services of the attorney who represented him during the DOJ investigation and sought an extension to seek new counsel. In addition, he also denied that he ever "knowingly or intentionally violated federal election law." See Attachment 6. He further states "I was one of the persons most responsible for forcing Mr. Marshall to resign from his position on the Tribal Council." *Id.*

1 waive its sovereign immunity or Congress can override sovereign immunity by specific
2 enactment, citing to *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 22, 25
3 (1st Cir. 2006). However, it also states that not all statutes of general application apply to
4 tribes and that federal statutes will not be interpreted to "interfere[] with tribal autonomy
5 and self government . . . in the absence of clear indications of legislative intent." See
6 *Santa Clara Pueblo v. Martinez*, 436 U.S. 48, 58 (1978); *Iowa Mutual Insurance*
7 *Company v. LaPlante*, 480 U.S. 9, 18 (1987). Further "because the Tribe retains all
8 inherent attributes of sovereignty that have not been divested by the Federal Government,
9 the proper inference from silence . . . is that the sovereign power . . . remains intact"
10 quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n. 14 (1982). The Tribe
11 also provides that a Massachusetts state court has held that the Mashpee Wampanoags, a
12 recognized Indian tribe, are "immune from suit absent a clear waiver by the Tribe or
13 congressional abrogation." See *Bingham v. Maushop, LLC, et. al.* (Mass. Superior Ct.
14 Civil No. 2006-00736) (Barnstable) (June 26, 2007).⁶

15 Second, the Tribe argues that "Marshall defrauded the Tribe using clandestine
16 accounts held in the name of the Fisherman's Association and/or the Fisherman's

⁶ The Tribe acknowledges that notwithstanding the holdings of the Supreme Court on which it relies, the FEC has taken the opposite position, namely, that the presumption is that a federal statute applies to a tribe absent an explicit indication by Congress to the contrary. Attachment 3 at 5-6; see also *Chairman Michael Toner and Vice Chairman Robert D. Lenhard Testimony On Indian Tribes and the Federal Election Campaign Act Before the Senate Committee on Indian Affairs, February 8, 2006*. The Tribal Council states, to the extent the General Counsel's position may find some support in the Ninth Circuit's opinion in *Donovan v. C'ouer d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), that opinion is based upon the Supreme Court's opinion in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), which was decided 22 years before *Merrion* and 27 years before that principle was reaffirmed in *Iowa Mutual*. The Tribe also argues that even if *Tuscarora* applies, it qualifies for the first exception noted in dictum in *Tuscarora*, namely, that the law touches on "exclusive rights of self-governance in purely intramural matters." Attachment 3 at 5. The response correctly notes that the First Circuit has not had the opportunity to address the import of the *Tuscarora* decision. *Id.*

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1 Association, Inc., neither of which were part of the Tribe.”⁷ Attachment 3 at 7. It also
2 asserts that in 2001, Marshall, during his tenure as Chairman, affirmatively informed the
3 Tribe that the Fisherman’s Association was not part of the Tribe, was not subject to
4 governance by the Tribal Council, and would not be kept or maintained as part of the
5 Tribe’s books and records. See Attachment 3 at 7. The Tribe denies that it knew
6 anything about the Fisherman’s Association account or that it approved any of the
7 “payments” made from the accounts. *Id.*

8 Third, Counsel for the Tribe notes that its members have a very low standard of
9 living, and in response to the current conditions, the Harvard Project on American Indian
10 Economic Development (“Harvard Project”) has agreed to oversee the Tribe’s
11 government and compliance modernization program. Attachment 3 at 8-10. The Tribe
12 has recently indicated that it is currently seeking funding for the Harvard Project and
13 hopes to obtain such funding in the near future. Attachment 4. The Harvard Project’s
14 effort will be public and open to inspection with the hope that a strong compliance
15 program “will prevent the Tribe from being victimized again by a rogue chairman or
16 leader.” Attachment 3 at 10. Although the Tribe argues against the Commission pursuing
17 it in an enforcement matter, it requests the opportunity to engage in conciliation efforts, if
18 necessary, while reserving all rights as to the Tribe’s sovereignty. *Id.* at 10.

19 Marshall’s counsel, in the pre-reason to believe response, states Marshall is an
20 “indigent 60 year old man, currently serving a 41 month sentence.” See Attachment 5.

⁷ Counsel for the Tribal Council, in response to a follow up inquiry, provided us with some copies of the checks in their possession written by Marshall from the Fisherman’s Association account. However, the Tribal Council asserts that it does not have any additional information regarding the Fisherman’s Association account and that Marshall has rebuffed all attempts to be interviewed by the new Tribal Council or its attorneys. See Attachment 4.

1 He also states that it is highly unlikely that, upon his release from prison, Marshall will be
2 able to satisfy the \$467,612.62 order of restitution. *Id.* Therefore, he argues that it
3 "would be fruitless to bring a civil action to seek recovery of any contributions allegedly
4 made by Mr. Marshall." *Id.*

5 **II. ANALYSIS**

6 **A. 2 U.S.C. § 441f**

7 The Act provides that no person shall make a contribution in the name of another
8 person or knowingly permit his or her name to be used to effect such a contribution, and
9 that no person shall knowingly accept a contribution made by one person in the name of
10 another person.⁸ See 2 U.S.C. § 441f. Furthermore, the Commission regulations provide
11 that no person shall "knowingly help or assist any person in making a contribution in the
12 name of another." 11 C.F.R. § 110.4(b)(iii).

13 **1. Marshall**

14 Marshall's criminal Information and Plea Agreement described a scheme to
15 influence Members of Congress by funneling contributions through his family members
16 and Tribal Council officers. Attachments #1 and 2. Marshall admitted making straw

⁸On June 8, 2009, a federal district court judge in California dismissed criminal charges that Pierce O'Donnell violated section 441f by reimbursing conduit contributions to the 2004 presidential campaign of Senator John Edwards, ruling in part that Congress did not intend that provision to outlaw indirect contributions made through conduits. *U.S. v. O'Donnell*, C.D. Cal., Criminal No. 08-872. However, the *O'Donnell* court's order is unlikely to be upheld on appeal because (1) it mistakenly assumes Section 441f prohibits all conduit contributions, including those reported under Section 441a(a)(8); (2) its analysis that the statutory construction of Section 441f is inconsistent with other provisions of the Act that explicitly identify "direct or indirect" contributions fails to realize that all "contribution[s] in the name of another" are inherently indirect; and (3) it mischaracterizes the legislative history to support the conclusion that Section 441f does not prohibit the reimbursement of conduit contributions. See MUR 5818 (Feiger) General Counsel's Report #2 at 15; Memorandum re: Recommendation to Participate as Amicus Curiae in *United States v. O'Donnell*, No. 09-50296 (9th Cir.), dated July 21, 2009. On September 23, 2009, the Commission filed an amicus curiae brief urging the Ninth Circuit to reverse the *O'Donnell* decision. See MUR 5504 (Károlyi) and MUR 5818 (Feiger) (recent Commission matters involving Section 441f violations).

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1 contributions personally and through these individuals and reimbursing them with Tribal
2 funds. He attempted to conceal the true source of the contributions. *Id.* The facts of the
3 present matter make it clear that Marshall has violated section 441f.

4 Nonetheless, we conclude that Marshall's punishment in the criminal context for
5 the activity in the present matter, including the substantial restitution order imposed upon
6 him, is sufficient. Marshall is currently serving a prison sentence of 3 ½ years and is
7 required to pay restitution of \$467,612.62 upon his release from prison. The Court did
8 not impose a fine upon Marshall due to his inability to pay. In addition, there is no
9 indication that Marshall will have any source of employment upon his release from
10 prison at the age of 64.

11 Further, the statute of limitations for the contributions, totaling \$31,700, made by
12 Marshall (as the perpetrator of the conduit scheme) as reflected in chart #1 will begin
13 expiring on March 7, 2010, less than five months from now and expire completely on
14 October 17, 2010. As to the potential additional straw contributions, totaling \$3,000
15 made by Hendricks and Moreno as reflected in chart #3, the statute of limitations will
16 expire on March 14, 2011 and March 31, 2011. The time constraints will likely present
17 some difficulty in completing the enforcement process before the statute of limitations
18 completely expires for the majority of the contributions at issue. Continuing to pursue
19 Marshall under these circumstances does not appear to be a prudent use of Commission
20 resources.

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2. The Tribe

Unlike Marshall, the Tribe's liability under §441f is less clear. First, as described more fully in Subsection II.B. below, there is now substantial doubt as to whether Tribal Council funds were used by Marshall to make the reimbursements to the conduits. Further, other Tribal officials claim not to have approved any of the payments or reimbursements from the Fisherman's Association account. Attachment 3 at 7.

Second, the Tribe's sovereign immunity defense is plausible, although we believe that we have good counterarguments. In contrast to the Tribe's arguments that only a tribe can waive its sovereign immunity and that the proper inference from statutory silence as to its applicability to Indian tribes is that the sovereign power remains intact, the Supreme Court has repeatedly affirmed the "plenary power" of Congress over Indian affairs, which includes the power to modify or eliminate tribal rights. *See e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (Federal Land Surplus Act did not preserve the reservation status of opened tracts, but resulted in diminishment of reservation such that the State of South Dakota ultimately acquired primary jurisdiction over tracts in question and its environmental laws applied).⁹ Further, the Court in *Donovan v. Coeur D'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)(quoting *U.S. v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980), *cert. denied* 449 U.S. 1111 (1981), adopted the *Tuscarora* dictum, which presumes that a statute of general applicability applies to a tribe unless it falls within one of the following three exceptions: 1) the law touches on "exclusive rights of self-governance in purely intramural matters," 2) the

⁹ The "plenary power" principle has also been reaffirmed in a more recent Federal Circuit Court case. *See also Hydro Resources, Inc. v. U.S. E.P.A.*, 562 F.3d 1249 (10th Cir. 2009).

1 application of the law to the tribe would "abrogate rights guaranteed by Indian Treaties,"
2 or 3) there is proof "by legislative history or some other means that Congress intended
3 [the law] not to apply to Indians on their reservations" *See Federal Power Comm'n v.*
4 *Tuscarora Indian Nation*, 362 U.S. 99 (1960).

5 While the Commission has consistently taken the position in MURs and AOs that
6 the Act applies to Indian tribes based on the *Tuscarora* presumption, no federal court has
7 ruled specifically on the applicability of the Act to Indian tribes or their members.¹⁰
8 Without federal decisions directly on point, it is fair to say that there are plausible
9 arguments for and good arguments against the assertion of tribal sovereignty as a bar to
10 enforcement, with some circuits adopting *Tuscarora* and holding that other federal
11 statutes apply to Indian tribes and other circuits rejecting the *Tuscarora* presumption as
12 merely dicta and holding that the federal and state statutes do not apply to Indian tribes.
13 This lack of absolute certainty on the sovereign immunity question is one of the factors
14 we took into account in our ultimate recommendation not to open an MUR regarding the
15 Tribe. *See* Subsection II.B. below.

¹⁰ While the Act does not expressly mention Indian tribes, the Commission has concluded in past advisory opinions and enforcement matters that unincorporated tribal entities are considered "persons" under the Act and thus subject to the various contribution prohibitions and limitations. *See* AO 2005-01 (addressing the question whether the Mississippi Band of Choctaw Indians' relationship to a for-profit tribal corporation would deem the Tribe a "general contractor" under the Act and regulations), and AO 2000-05 (addressing the question of applicability of Act and regulations to contributions by the Oneida Nation of New York totaling more than \$25,000 annually); *see also* AOs 1999-32, 1993-12 and 1978-51.

The enforcement matters in which the Commission has considered the applicability of the Act and regulations to unincorporated tribal entities include MURs 4867 (Five Civilized Tribes) (Commission concluded that "there are no treaty rights or inherent sovereign powers of the Tribe that could possibly be affected by the regulation of their involvement in the Federal election process"), 2465 (Seminole Tribe of Florida) and 2302 (Sisseton-Wahpeton Sioux Indian Tribe) (Commission found Tribe to be a political committee in violation of Act's reporting and registration requirements). In MUR 2465, tribal sovereignty was raised as a defense in a subpoena enforcement action involving the Seminole Tribe of Florida, but the court never ruled on this issue because the parties were able to work out an agreement regarding the

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B. 2 U.S.C. § 441b

Corporations are prohibited from making contributions from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). It is also unlawful for an officer or director of a corporation to consent to any contribution by the corporation that is prohibited by the Act. *Id.*

Although the Information did not contain any allegations of violations of 2 U.S.C. § 441b on the part of the Tribal Council and the corporate officers (Marshall, Hendricks and Moreno), there is the issue of whether the funds used to make the reimbursements to the conduits were actually Tribal Council funds, thereby resulting in a violation of 441b. As noted previously, the Tribal Council is a corporation, and Marshall, Hendricks, and Moreno were corporate officers.

Based on information provided by the Tribal Council in its pre-reason to believe response, there is now substantial doubt as to whether Tribal Council funds were used by Marshall to make the reimbursements to the conduits. It appears that the Fisherman's Association account used by Marshall to make the reimbursements was not an account belonging to Tribal Council and had not been since 2001. *See* Attachment 3.

As a result of the agreement with AtMashpee, Marshall directed that funds associated with the lobbying efforts on behalf of the Tribe be directly deposited into the Fisherman's Association account between 2003 and 2007. There were only two signatories on this account, Marshall and another unidentified Tribal Council officer. It was a portion of these funds that Marshall used to reimburse the conduits. Therefore, it is

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1 at best unclear whether the Tribal Council's funds were used by Marshall to further his
2 conduit scheme.

3 In addition, should the Commission decide to proceed against the Tribal Council
4 in order to investigate the source of the funds used for reimbursement purposes, the Tribe
5 has indicated it intends to vigorously pursue a tribal sovereignty defense against any
6 enforcement matter. As described above, it has a plausible argument in favor of tribal
7 sovereignty, even though we disagree that it would ultimately succeed.

8 We have taken several factors into consideration in our analysis of potential
9 reason to believe findings in regard to potential violation of section 441b by the Tribal
10 Council: 1) the uncertainty as to whether the funds used for reimbursement purposes
11 were Tribal funds, 2) the disagreement amongst the Circuits as to the proper inference
12 when federal statutes are silent as to the applicability to Indian tribes, 3) the lack of a
13 federal court case affirming the applicability of the Act to Indian tribes, and 4) the
14 looming expiration of the statute of limitations. We conclude that it would not be a
15 prudent use of the Commission resources to pursue the Tribal Council in the enforcement
16 context.

17 As to the Fisherman's Association, there is every indication that the corporation
18 may be an "empty shell." Moreover, it would take significant effort to explore the
19 relationship between the Fisherman's Association and the Tribal Council. Accordingly,
20 we believe it would not be a prudent use of the Commission's resources to pursue the
21 Fisherman's Association either.

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C. The Conduits

Finally, we do not recommend that the Commission pursue the individual conduits. In most cases, the Commission has not pursued conduits in contribution reimbursement schemes because they were subordinate employees or spouses. There can be circumstances in a particular case, however, that will warrant pursuing the conduits, such as when these individuals were actively involved in the reimbursement schemes, coerced or encouraged others to participate in such schemes, or were public officials.¹¹ In this case, however, the information we have does not demonstrate the existence of these kinds of circumstances, making pursuit of Hendricks and Moreno unwarranted. At most, the information we have shows that Hendricks and Moreno were Tribal Council officers during the time period of Marshall's reimbursement scheme, but we do not know if merely holding these positions created any of the circumstances mentioned above. Moreover, given that we would need to initiate an investigation to resolve the discrepancy between Marshall's criminal Information and the Tribal Council's response as to whether the reimbursements were made by Marshall with Tribal Council funds, and the looming expiration of the statute of limitations, we do not believe it would be a prudent use of the Commission resources to pursue the conduits.

¹¹ See e.g., MUR 5871 (Noe) (After an investigation, the Commission found reason to believe as to conduits who (1) not only actively participated in the conduit scheme, but also recruited others to participate, and (2) public officials who participated in the scheme, but ultimately took no further action as to conduits who were merely subordinates/employees; MUR 6054/PM 469 (Buchanan)(open matter)(Commission found reason to believe and authorized an investigation regarding two managers who made reimbursed contributions where there was information indicating that they also coerced or encouraged other employees to participate in the scheme); and MUR 5666 (MZM)(After an investigation, Commission found reason to believe as to one conduit, a senior manager of MZM, who reimbursed other less-senior conduits and himself with MZM funds for political contributions, but Commission took no further action as to other less-senior employee conduits; the Commission ultimately accepted a signed conciliation agreement from the senior manager conduit admitting to a violation of 2 U.S.C. § 441f and providing for a civil penalty of \$42,000).

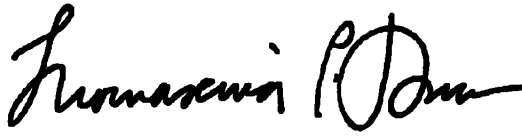
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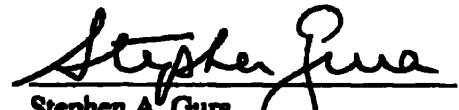
Accordingly, we recommend that the Commission exercise its prosecutorial discretion and decline to open a Matter Under Review as to Glenn Marshall, the Tribal Council, the Fisherman's Association, and the conduits in this matter and close the file.

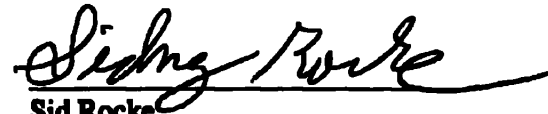
III. RECOMMENDATIONS

1. Decline to Open a Matter Under Review;
2. Approve the appropriate letters; and
3. Close the file.

October 27, 2009
Date


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